

NTSB Order No. EA-4836

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of April, 2000

Respondent .

Docket SE-15854

The respondent, by counsel, has appealed from the oral initial decision Administrative Law Judge William A. Pope, II, rendered in this proceeding on March 16, 2000, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed the emergency suspension of respondent's mechanic certificate until such time as he passes a practical test of his

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qualifications to hold such a certificate.² For the reasons discussed below, the appeal will be denied.³

The Administrator's January 26, 2000 Emergency Order of Suspension alleged, among other things, the following facts and circumstances concerning the respondent:

1. At all times material herein you were and are now the holder of Mechanic Certificate No. 568613908.

2. By letter dated August 18, 1999, you were advised by an inspector of the Federal Aviation Administration (FAA) that as a result of an investigation into St. George Aviation, your competence as a certificated airman was in question, and that a reexamination of your qualifications to be the holder of a mechanic certificate was necessary in the interest of aviation safety.

3. On December 6 and 7, 1999, you appeared for a reexamination at the FAA Orlando Flight Standards District Office, Orlando, Florida.

4. You were administered a reexamination by an inspector of the FAA on those subject areas in which competence is required for initial issuance of a mechanic certificate.

5. The results of the reexamination were not satisfactory in that you failed to demonstrate an acceptable level of competence in all of the subject areas in which competence is required for the issuance of a mechanic certificate.

The law judge found, among other things, that the respondent could not challenge the validity of the Administrator's reexamination request once he had taken a retest,⁴ that the

²The law judge did not affirm the requirement in the Administrator's order that respondent retake the oral test portion of the mechanic certificate exam.

³The Administrator has filed a reply opposing the appeal.

⁴In this connection, the law judge cited Administrator v. Wollgast, 7 NTSB 1216 (1991) and Administrator v. Derby, 2 NTSB 348 (1973).

Administrator had proved by a preponderance of the evidence that respondent had failed the practical test portion of the mechanic exam by incorrectly answering two questions in the subject area of physics, that the procedures followed in administering the examination to respondent were fair and unbiased,⁵ and that deference was owed the Administrator's interpretation, in a published, publicly available order, that the regulatory standard for successful performance on a mechanic test applied to each of the examination's various parts. We concur in the law judge's resolution of these issues.

Respondent's appeal, although renewing here most of the contentions made to the law judge, identifies no error in the law judge's rationale or reasons for rejecting them in light of the applicable laws and evidence of record.⁶ In fact, except for urging the reversal of the law judge's partial upholding of the Administrator's order, respondent's rancorous brief largely ignores the initial decision's findings and conclusions,⁷ in

⁵Not only did respondent fail to advance any evidence demonstrating unfairness in the administering of the test to him, the record reflects, to the contrary, that the FAA inspectors conducted the exam in a manner designed to facilitate his successful completion. Despite their obvious efforts to help him through the exam, they are accused here of looking for "some reason to fail him" and their indulgent conduct of the exam is characterized as "akin to an inquisition or other process to intimidate."

⁶Our rules specify that an appeal brief "shall set forth in detail the objections to the initial decision...and the reasons for such objections" (Section 821.48(b), 49 C.F.R. Part 821).

⁷The respondent's brief, in arguing that respondent only answered one question incorrectly, also ignores the law judge's determination, based on a credibility finding in favor of an

favor of rhetoric that mostly disregards the evidentiary record.⁸ It therefore does not present a genuine issue for our consideration.⁹ We will, nevertheless, briefly discuss our reasons for agreeing with the law judge's disposition of respondent's main point of contention.

The respondent contends, in effect, that because section 65.17(b) of the Federal Aviation Regulations establishes that "[t]he minimum passing grade for each [test prescribed or required under FAR Part 65] is 70 percent," the Administrator is not free, as he alleges she did in this case, to require a higher

(..continued)

inspector witness testifying for the Administrator, that the respondent incorrectly answered both questions asked in the physics practical portion of the exam. Specifically, he had difficulty identifying the high and low pressure and velocity areas of a venturi on a drawing and using a formula to convert a Fahrenheit temperature to its Centigrade equivalent. The latter project was, according to the inspector selecting the test material, the easiest one he could find in the test booklet.

⁸It is understandable that a certificate holder whose qualifications are perceived as having come under attack for reasons beyond his control may be displeased, even resentful, because of the possible burden and inconvenience that a reexamination might entail. At the same time, we would hope that such certificate holders would eventually appreciate that whatever personal hardships they may face are far outweighed by the risks to the public that may flow from permitting aircraft to be serviced by the inadequately trained or unqualified. See Administrator v. Carson and Richter, NTSB Order No. EA-3905 (1993) and Administrator v. Santos and Rodriguez, NTSB Order No. EA-4266 (1994). We would add, moreover, our view that the Administrator's efforts to ensure the competence of certificate holders where genuine doubts arise should be applauded, not reviled.

⁹Section 821.49 of our Rules of Practice states that on appeal we will only consider the following issues: "(1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence? (2) Are conclusions made in accordance with law, precedent, and policy? (3) Are the questions on appeal substantial? (4) Have any prejudicial errors occurred?"

passing grade on any of the constituent parts of a test. In our view, whether respondent's premise is correct is beside the point, for we do not agree, if the Administrator's interpretation of her regulation is accepted, that respondent was required to achieve more than 70 percent on the practical part of the mechanic retest he took.

Aside from setting the minimum passing score for each test, which respondent maintains is different from setting the minimum passing score for each part of a test, the Administrator's regulations do not provide specific information about how the three parts of a mechanic exam should be structured, administered, or graded. Detailed instructions for designated mechanic examiners (DMEs) and others governing such matters and more is, however, published in FAA Order 8610.4G. It specifies, as to the oral part of the exam, that the examiner must ask at least four questions in each of the 43 subject areas and that 70 percent of the questions asked in each subject area must be answered correctly.¹⁰ As to the part of the test requiring a practical demonstration of mechanical knowledge and skill, the order permits an examiner to give four or more practical projects in each of the same 43 subject areas, but only requires that he or she give one. Thus, if an applicant performs the first project correctly, a passing score is achieved without further testing in that subject area. On the other hand, if an applicant

¹⁰Consequently, providing the right answer to three of the questions asked in each subject area will result in a passing grade.

incorrectly performs the first two practical projects assigned, he would need to be given, and pass successfully, at least another five projects to meet the 70 percent minimum grade requirement.

Respondent does not directly argue that the examiner was required to give him five more practical projects in an effort to see if he could achieve a passing grade. Rather, he argues that because he had already correctly answered one question in each of nine prior subject areas, failing him for not correctly answering one (or two) questions in the basic physics subject area ignored the fact that up to that point he had a 90 percent pass rate. This, he says, the Administrator cannot do in the face of a regulation that only requires a 70 percent passing grade on the test. Like the law judge, we do not agree.

It would appear to be within the Administrator's authority to revise her regulation either to expressly state, as Order 8610.4G demonstrates, that the needed 70 percent minimum passing grade applies to each and every section or subsection of a mechanic examination or to adopt a policy that allowed the 70 percent pass rate to be based on an average of the scores within a section of the test. The only issue that presently concerns us, however, is not which standard the Administrator should apply in her discretion, but whether the Board must defer to Order 8610.4G as a valid interpretation of a regulation that could be read more than one way.

By law, the Board is "bound by all validly adopted

interpretations of laws and regulations the Administrator carries out...unless [we find an interpretation] is arbitrary, capricious, or otherwise not according to law" (49 U.S.C.A. § 44709(d)(3)). Aside from complaining that he would not have failed the practical test, at least not up to the point at which it was stopped, if the 70 percent standard were applied differently from the guidance set forth in Order 8610.4G, respondent has not shown that the Administrator's interpretation that her regulation contemplates a far more stringent testing standard is in any way arbitrary or capricious as applied to him or anyone else. To be sure, the Administrator's interpretation makes the mechanic certificate considerably more difficult to obtain. That circumstance, however, has no bearing on the matter, for the Administrator's judgment, as evidenced by Order 8610.4G, that mechanic certificate applicants must show a broader range of competence than the standard that respondent espouses is unquestionably a reasonable one that falls well within the scope of her discretion to set the qualifications for the various certificates she is authorized to issue. Our deference to that judgment is required.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied¹¹; and
2. The emergency order of suspension, as modified by the law judge, and the initial decision are affirmed.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

¹¹Also denied is respondent's request, in the event his appeal is denied, that we direct the Administrator to allow him to be retested by a DME rather than by an FAA inspector. Assuming, arguendo, that the Board has such authority, no valid reason has been identified in this case for exercising it.